IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 996 OF 2006
WITH
CRIMINAL APPEAL NO. 736 OF 2006

1. Mustaq Ahmed Mohammed Isak and ors. ..Appellants
Vs.
The State of Maharashtra ..Respondent

Mr. Amin Solkar and Sarfaraz Khalife for appellants.
Ms. P.H. Kantharia, APP for State.

CORAM: B.H. MARLAPALLE & R.S. MOHITE,JJ.

Reserved on : 2nd March, 2007

Pronounced on : 4th May, 2007

ORDER (PER B.H. MARLAPALLE,J.):

1. Criminal Appeal No. 996 of 2006 filed under Section 12 of the Maharashtra Control of Organised Crime Act, 1999 (for short the said Act) challenges the order dated 4/9/2006 passed by the learned Special Judge under the said Act in Bail Application No. 32 of 2006 filed in Remand Application No. 17 of 2006.

2. The Bail Application was preferred by the accused nos.5 to 8 challenging the order dated 21/8/2006 passed by the Special Court thereby granting second extension of 15 days to complete the

investigation and file charge-sheet. The Bail Application came to be rejected. It has been prayed in this appeal that the appellants be released on bail in LAC No. 3 of 2006 on default of the prosecution in completing the investigation within the extended period granted upto 21/8/2006. Whereas in Criminal Appeal No. 736 of 2006 filed by the original accused nos. 5 to 8 under Section 12 of the said Act, the order of extension passed by the Special Court on 7/8/2001 in MA No. 260 of 2006 filed in Remand Application No. 52 of 2006 is prayed to be quashed and set aside and the appellants be released on suitable bail on default of the prosecution in filing the charge-sheet within the specified period of 90 days. As per the prosecution this appeal would not survive after the dismissal of Bail Application No. 32 of 2006, by the Special Court.

3. The admitted sequence of events in the instant appeals is as under:-

(a) The appellants were arrested on 13/5/2006 on the charges punishable under the MCOC Act, 1999.

(b) The period of initial 90 days to complete the investigation expired on 6/8/2006.

(c) The first application by the prosecutor for extension of time was filed on 3/8/2006.

(d) The first order granting extension was passed on 7/8/2006 and the extension of 15 days so granted was to expire on 21/8/2006.

(e) The second application for extension was preferred by the prosecutor on 21/8/2006 seeking further extension and the Special Court granted extension upto 4/9/2006.

(f) The charge-sheet has been filed on 4/9/2006.

(g) Criminal Appeal No. 996 of 2006 has been presented on 7/10/2006 before this court i.e. after the charge-sheet was filed.

. It is submitted that the Special Court erred

in law in rejecting the bail application by its order dated 4/9/2006 and while doing so it misinterpreted the provisions of Section 21(2)(b) of the said Act. In short, it is submitted by the learned counsel for the appellants that though the period for completing the investigation and filing the charge-sheet is extended by another 90 days and the investigation is required to be completed in a maximum period of 180 days, there is no provision for granting extension after completion of 90 days, in piecemeal in as much as the power of granting extension beyond 90 days can be exercised by the Special Court only once and while doing so, the Special Court on an application moved by the prosecutor can either refuse to grant extension or grant extension for any number of days upto 90 days, but if the extension application for the first occasion is considered and extension is granted for any period less than 90 days, the second application for granting extension moved by the prosecutor cannot be entertained and the Special Court has no such powers to consider such second application or any number of applications filed by the prosecutor for extension upto a total period of 180 days to complete the investigation and file the charge-sheet.

4. The learned APP has filed affidavit in reply and opposed these appeals. It is submitted that the interpretation sought to be made by the learned Counsel for the appellants about the scheme of Section 21(2)(b) is misconceived and if such interpretations are accepted, the accused could be adversely affected and it may mar the accountability of the I.O. to complete the investigation and file the charge-sheet at the earliest and within 180 days. It is further submitted that granting extensions of short durations from time to time upto a further period of 90 days keeps the checks and balances. The extensions are not granted for asking. The extension application is required to be submitted by the prosecutor and not by the I.O. and if the court is not satisfied by the progress made in the investigation, the first application or the subsequent application can be rejected. If the extension on the basis of the first application is granted for a maximum period of 90 days, the I.O. would relax and even if the investigation is completed, let us say in 30 days time, he would not file the charge-sheet unless the period of 90 days would come to an end and thus, the

right of the accused to file an application for being released on bail after filing the charge-sheet would be adversely affected. On the contrary, if more than one applications are entertained, the Investigating Officer would be duty bound to take due steps and put in his best efforts to complete the investigation within the extended period and if he could not do so, he is required to satisfy the prosecutor, who in turn is required to satisfy the court for considering second or any subsequent extension upto a maximum period of 90 days. The learned APP further submitted that there is no supporting law on the interpretation sought to be made by the appellants on the scheme of Section 21(2)(b) of the said Act. Section 21 (1) and (2) of the said Act reads as under:-

> 21. Modified application of certain provisions of the Code. --- (1) Notwithstanding anything contained in the Code or in any other law, every offence punishable under this Act, shall be deemed to be a cognizable offence within the meaning of clause (c) of section 2 of the Code and "cognizable case" as defined in that clause shall be construed accordingly.
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> (2) Section 167 of the Code shall apply in relation to a case involving an offence punishable under this Act subject to the modifications that, in subs section (2), --
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> (a) the references to "fifteen days", and

"sixty days", wherever they occur, shall be construed as references to "thirty days" and "ninety days", respectively;

(b) after the proviso, the following proviso shall be inserted, namely:---

"Provided further that if it is not possible to complete the investigation within the said period of ninety days, the Special Court shall extend the said period upto one hundred and eighty days, on the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of ninety days."

5. The scheme of Section 167 (2) of Cr.P.C. and more particularly the proviso thereunder fell for consideration before a three Judge Bench in the case of Hussainara Khatoon and ors. vs. Home Secretary, State of Bihar, Patna **[AIR 1979 SC 1377]** and their Lordships stated,

".....When an undertrial prisoner is produced before a Magistrate and he has been in detention for 90 days or 60 days, as the case may, the Magistrate must, before making an order of further remand to judicial custody, point out to the undertrial prisoner that he is entitled to be released on bail. The State Government must also provide at its own cost a lawyer to the undertrial prisoner with a view to enable him to apply for bail in exercise of his right under proviso (a) to sub-section (2) of Section 167 and the Magistrate must take care to see that the right of the undertrial prisoner to the assistance of a lawyer provided at State cost is secured to him and

> he must deal with the application for bail in accordance with the guidelines laid down by us in our Order dated 12th February, 1979. We hope and trust that every Magistrate in the country and every State Government will act in accordance with this mandate of the Court. This is the constitutional obligation of the State Government and the Magistrate and we have no doubt that if this is strictly carried out, there will be considerable improvement in the situation in regard to undertrial prisoners and there will be proper observance of the rule of law."

. It is a well settled position in law that on expiry of the period of 90 days or 180 days, as the case may be, the right of the accused for being released on bail is not automatic and he is required to make an application and show his willingness to furnish a bond for being released on bail.

6. The arguments of the learned counsel for the appellants, as advanced before us, are substantially based on the decision in the case of Hitendra Vishnu Thakur and ors. vs. State of Maharashtra **[(1994) 4 SCC 602]** and it was contended that once an application for extension for any period upto 90 days was considered and allowed by the Special Court, no further application can be entertained for extension for the remaining period or for any period upto the

remaining period, thus making total extension of 90 days. It was further submitted that if such applications beyond the first application after 90 days are considered, the indefeasible right of being released on bail of the accused is adversely affected. In short it was contended that on the expiry of the extended period the accused has acquired the right of being released on bail automatically. These submissions cannot be accepted on the face of the law laid down in the case of Hussainara Khatoon (Supra), as the accused does not get a bail automatically on failure to file the challan within 90 days.

7. In the case of Hitendra Thakur (Supra) the Apex Court considered the scheme of Section 20(4) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 read with Section 167 of Cr.P.C. In paras 21 and 22 their Lordships stated thus, in that case:-

> "21. Thus, we find that once the period for filing the chargesheet has expired and either no extension under clause (bb) has been granted by the Designated Court or the period of extension has also expired, the accused person would be entitled to move an application for being admitted to bail under sub-section (4) of Section 20 TADA read with Section 167 of the Code and the Designated Court shall release him on bail, if the

accused seeks to be so released and furnishes the requisite bail. We are not impressed with the argument of the learned counsel for the appellant that on the expiry of the period during which investigation is required to be completed under Section 20(4) TADA read with Section 167 of the Code, the court must release the accused on bail on its own motion even without any application from an accused person on his offering to furnish bail. In our opinion an accused is required to make an application if he wishes to be released on bail on account of the 'default' of the investigating/prosecuting agency and once such an application is made, the court should issue a notice to the public prosecutor who may either show that the prosecution has obtained the order for extension for completion of investigation from the court under clause (bb) or that the challan has been filed in the Designated Court before the expiry of the prescribed period or even that the prescribed period has actually not expired and thus resist the grant of bail on the alleged ground of 'default'. The issuance of notice would avoid the possibility of an accused obtaining an order of bail under the 'default' clause by either deliberately or inadvertently concealing certain facts and would avoid multiplicity of proceedings. If would, therefore, serve the ends of justice if both sides are heard on a petition for grant of bail on account of the prosecution's 'default'. Similarly, when a report is submitted by the public prosecutor to the Designated Court for grant of extension under clause (bb), its notice should be issued to the accused before granting such an extension so that an accused may have an opportunity to oppose the extension on all legitimate and legal grounds available to him. It is true that neither clause (b) nor clause (bb) of sub-section (4) of Section 20 TADA specifically provide for the issuance of such a notice but in our opinion the issuance of such a notice must be read into these provisions both in the interest of the accused

and the prosecution as well as for doing complete justice between the parties. This is a requirement of the principles of natural justice and the issuance of notice to the accused or the public prosecutor, as the case may be, would accord with fair play in action, which the courts have always encouraged and even insisted upon. It would also strike a just balance between the interest of the liberty of an accused on the one hand and the society at large through the prosecuting agency on the other hand. There is no prohibition to the issuance of such a notice to the accused or the public prosecutor in the scheme of the Act and no prejudice whatsoever can be caused by the issuance of such a notice to any party. We must as already noticed reiterate that the objection to the grant of bail to an accused on account of the 'default' of the prosecution to compete the investigation and file the challan within the maximum period prescribed under clause (b) of sub-section (4) of Section 20 TADA or within the extended period as envisaged by clause (bb) has to be limited to cases where either the factual basis for invoking the 'default' clause is not available or the period for completion of investigation has been extended under clause (bb) and the like. No other condition like the gravity of the case, seriousness of the offence or character of the offender etc. can weight with the court at that stage to refuse the grant of bail to an accused under sub-section (4) of Section 20 TADA on account of the 'default' of the prosecution.

22. An application for grant of bail under Section 20(4) has to be decided on its own merits for the default of the prosecuting agency to file the chargesheet within the prescribed or the extended period for completion of the investigation uninfluenced by the merits or the gravity of the case. The court has no power to remand an accused to custody beyond the period prescribed by clause (b) of Section 20(4) or extended under clause

(bb) of the said section, as the case may be, if the challan is not filed, only on the ground that the accusation against the accused is of a serious nature or the offence is very grave....."

. Whereas in conclusion, their Lordships stated

in para 30 of the said decision as under,

"30. In conclusion, we may (even at the cost of repetition) say that an accused person seeking bail under Section 20(4) has to make an application to the court for grant of bail on ground of 'default' of the prosecution and the court shall release the accused on bail after notice to the public prosecutor uninfluenced by the gravity of the offence or the merits of the prosecution case since Section 20(8) does not control the grant of bail under Section 20(4) of TADA and both the provisions operate in separate and independent fields. It is, however, permissible for the public prosecutor to resist the grant of bail by seeking an extension under clause (bb) by filing a report for the purpose before the court. However, no extension shall be granted by the court without notice to an accused to have his say regarding the prayer for grant of extension under clause (bb). In this view of the matter, it is immaterial whether the application for bail on ground of 'default' under Section 20(4) is filed first or the report as envisaged by clause (bb) is filed by the public prosecutor first so long as both are considered while granting or refusing bail. If the period prescribed by clause (b) of Section 20(4) has expired and the court does not grant an extension on the report of the public prosecutor made under clause (bb), the court shall release the accused on bail as it would be an indefeasible right of the accused to be so released. Even where the court grants an extension under clause (bb) but the charge-sheet is not filed within the

extended period, the court shall have no option but to release the accused on bail if he seeks it and is prepared to furnish the bail as directed by the court. Moreover, no extension under clause (bb) can be granted by the Designated Court except on a report of the public prosecutor nor can extension be granted for reasons other than those specifically contained in clause (bb) which must be strictly construed."

8. The Constitution Bench in the case of Sanjay Dutt vs. State, through C.B.I., Bombay (II) **[(1994) 5 SCC 410]** considered the law laid down in Hintendra Thakur's case alongwith a host of other decisions and stated in paras 48 and 49 as under:-

"48. We have no doubt that the common stance before us of the nature of indefeasible right of the accused to be released on bail by virtue of Section 20(4)(bb) is based on a correct reading of the principle indicated in that decision. The indefeasible right accruing to the accused in such a situation is enforceable only prior to the filing of the challan and it does not survive or remain enforceable on the challan being filed, if already not availed of. Once the challan has been filed, the question of grant of bail has to be considered and decided only with reference to the merits of the case under the provisions relating to grant of bail to an accused after the filing of the challan. The custody of the accused after the challan has been filed is not governed by Section 167 but different provisions of the Code of Criminal Procedure. If that right had accrued to the accused but it remained unenforced till the

filing of the challan, then there is no question of its enforcement thereafter since it is extinguished the moment challan is filed because Section 167 Cr.P.C. ceases to apply. The Division Bench also indicated that if there be such an application of the accused for release on bail and also a prayer for extension of time to complete the investigation according to the proviso in Section 20(4)(bb), both of them should be considered together. It is obvious that no bail can be given even in such a case unless the prayer for extension of the period is rejected. In short, the grant of bail in such a situation is also subject to refusal of the prayer for extension of time, if such a prayer is made. If the accused applies for bail under this provision on expiry of the period of 180 days or the extended period, as the case may be, then he has to be released on bail forthwith. The accused, so released on bail may be arrested and committed to custody according to the provisions of the Code of Criminal Procedure. It is settled by Constitution Bench decisions that a petition seeking the writ of habeas corpus on the ground of absence of a valid order of remand or detention of the accused, has to be dismissed, if on the date of return of the rule, the custody or detention is on the basis of a valid order. (See Naranjan Singh Nathawan vs. State of Pubjab; Ram Narayan Singh vs. State of Delhi and A.K. Gopalan vs. Government of India.)

49. This is the nature and extent of the right of the accused to be released on bail under Section 20(4)(bb) of the TADA Act read with Section 167 Cr.P.C. in such a situation. We clarify the decision of the Division Bench in Hitendra Vishnu Thakur, accordingly, and if it gives a different indication because of the final order made therein, we regret our inability to subscribe to that view."

9. In the case of Uday Mohanlal Acharya vs. State of Maharashtra **[2001 AIR SCW 1500]** a three Judge Bench, in its majority view, referred to the earlier decision in Hintendra Thakur's and Sanjay Dutt's cases as well as the subsequent decisions in the case of State through CBI vs. Mohd. Ashraft Bhat [1996 AIR SCW 237], Dr. Bipin Shantilal Panchal vs. State of Gujarat [1996 AIR SCW 734], Mohamed Iqbal Madar Sheikh vs. State of Maharashtra [(1996) 1 SCC 722] and State of M.P. vs. Rustam [1995 Supp (3) SCC 221] and held on the indefeasible right of accused for being admitted to bail as under:-

> "..... A conspectus of the aforesaid decisions of this Court unequivocally indicates that an indefeasible right accrues to the accused on the failure of the prosecution to file the challan within the period specified under sub-section (2) of S. 167 and that right can be availed of by the accused if he is prepared to offer the bail and abide by the terms and conditions of the bail, necessarily, therefore, an order of the Court has to be passed. It is also further clear that indefeasible right does not survive or remain enforceable on the challan being filed, if already not availed of, as has been held by the Constitution Bench in Sanjay Dutt's case (1994 AIR SCW 3857 : 1995 CRI LJ 477) (Supra). The crucial question that arises for consideration, therefore, is what is the true meaning of the expression 'if already not availed of'? Does it mean that an accused files an application for bail and offers his willingness for being released on bail or does

it mean that a bail order must be passed, the accused must furnish the bail and get him released on bail? In our considered opinion it would be more in consonance with the legislative mandate to hold that an accused must be held to have availed of his indefeasible right, the moment he files an application for being released on bail and offers to abide by the terms and conditions of bail. To interpret the expression 'availed of' to mean actually being released on bail after furnishing the necessary bail required would cause great injustice to the accused and would defeat the very purpose of the proviso to S. 167(2) of the Criminal Procedure Code and further would make an illegal custody to be legal, in asmuchas after the expiry of the stipulated period the Magistrate had no further jurisdiction to remand and such custody of the accused is without any valid order of remand. That apart, when accused files an application for bail indicating his right to be released as no challan had been filed within the specified period, there is no discretion left in the Magistrate and the only thing he is required to find out is whether the specified period under the statute has elapsed or not, and whether a challan has been filed or not. If the expression 'availed of' is interpreted to mean that the accused must factually be released on bail, then in a given case where the Magistrate illegally refuses to pass an order notwithstanding the maximum period stipulated in S. 167 had expired, and yet not challan had been filed then the accused could only move to the higher forum and while the matter remains pending in the higher forum for consideration, if the prosecution files a chargesheet then also the so-called right accruing to the accused because of inaction on the part of the investigating agency would get frustrated. Since the legislative have given its mandate it would be the bounden duty of the Court to enforce the same and it would not be in the interest of justice to negate the same by interpreting the expression 'if not availed

of' in a manner which is capable of being abused by the prosecution..."

10. Having regard to the law laid down in the above referred cases, we have no doubt in our mind that after the charge-sheet was filed on 4/9/2006, the application filed for being released in default of the prosecution to complete the investigation did not survive and the same has been rightly rejected by the impugned order. On the point of the indefeasible right of an accused being released on bail, we state that the said right is not automatic and on the last day of the extended period the accused is required to file an application for admitting to bail and if on the same day or on an earlier day the prosecutor has filed an application for further extension, both these applications will have to be considered simultaneously by the Special Court. If the application moved by the prosecutor is rejected, the application submitted by the accused for being admitted to bail succeeds and the vice a versa. When an extension is granted for a particular period the accused is thus aware that on the last day of such extended period he is entitled to move an application for being admitted to bail and

thus his right to apply for bail is crystalised on the last day of the extended period either beyond 90 days and extended from time to time upto a total of 180 days. It cannot be accepted that the prosecutor can file an application for extension only once. The Special Court is required to apply its mind and keep the Investigating Agency under check and to achieve this it is required to consider the period of extension to be granted from time to time, but upto the maximum of 180 days and, therefore, depending upon the facts of the case, progress of the investigation as placed before it by the prosecutor will have to be considered for granting extensions on more than one occasion or occasions. We do not agree with the learned counsel for the appellants that the Special Court can entertain such an application for extension only once and entertaining such applications on more than one occasions would cause any prejudice to the indefeasible right of the accused for being released on bail in default of the investigation being completed within the stipulated period. The expiry of the first extended or subsequently extended period is known to the accused and he has a right to move an application for admitting to bail on the last of such

extended period. If the prosecution moves another application for further extension, the accused has a right for notice and hearing on such an application. Serving a copy of the application to the learned Advocate of the accused by the learned Prosecutor is a sufficient notice to the accused and the Special Court will have to hear both the parties on such an application which has to be decided before the extended period expires. But in any case, the accused is not entitled for being released on bail automatically on expiry of the extended period and he has to apply for the same indicating his willingness to furnish a bond for being admitted to bail. The indefeasible right of the accused is thus two fold on the expiry of the extended period namely,

(a) to submit an application for being admitted to bail on his willingness to furnish a bond and

(b) for notice and hearing on the application filed by the prosecutor for the first or further extension.

11. In Criminal Appeal No. 736 of 2006 the order dated 7/8/2006 granting the first extension for 15 days has been questioned on the ground that the prosecutor failed to make out the ingredients set out under Section 21 (2)(b) proviso and more particularly it did not disclose the progress of the investigation done till date the application was submitted. It is contended that the application submitted for extension by the prosecutor must state specific reasons for the detention being continued beyond 90 days on failure to complete the investigation and the ingredients of Section 21 being mandatory in nature, they cannot be trifled in casual and cavalier manner. In para 15 of the application the prosecutor stated that she had herself gone through the investigation papers and considering the voluminous record and the complicity of the accused, the police required more time to investigate beyond 90 days and to complete the investigation. She stated that she was satisfied that the I.O. required at least 30 days more time for filing the final report and, therefore, extension was prayed beyond 90 days under Section 21(2)(b) of the said Act. Having considered the arguments of both the parties, the learned Judge of the Special Court in her

impugned order dated 7/8/2006 recorded her satisfaction to grant extension in the following words:-

> "Considering the volume of the matter, it appears that the police need some time to collect information and investigate all the points mentioned above. I am of the opinion with a view that in this case, Section 21(1)(b) is to be invoked and time to file final report is extended for a period of 15 days i.e. upto 21.8.2006."

We are satisfied that the first extension so granted was not granted in a casual or mechanical manner and the prosecutor had made out a case for extension beyond 90 days.

12. It is pertinent to note that on the day this application was filed i.e. on 3/8/2006 or thereafter till 7/8/2006 the accused had not moved an application for being released on bail on completion of 90 days. Their indefeasible right to apply for being released

on bail accrued to them on 6/8/2006 as well as on 21/8/2006. However, it appears that the first bail application i.e. Bail Application No. 32 of 2006 was filed on 4/9/2006.

13. The challenge raised in both these appeals is, therefore, devoid of merits and the appeals must fail.

14. Both the appeals are dismissed.

(R.S. Mohite,J.) **(B.H. Marlapalle,J.)**